

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPEAL NO. 123 OF 2016**

*(Arising from the decision of Morogoro District Land and Housing Tribunal Appeal No. 18 of 2016  
as per Hon. Mbega, Chairperson)*

**FRANCIS KAZIMOTO ..... APPELLANT**

**VERSUS**

**DAGLAS MKUNDA ..... RESPONDENT**

**JUDGEMENT**

**MAIGE, J.**

This is an appeal against the decision of the District Land and Housing Tribunal for Morogoro (“the appellate tribunal”) on appeal from the decision of the ward tribunal of Idibo (“the trial tribunal”). In the said decision, the **appellate tribunal**, reversed the decision of the **trial tribunal** and declared the respondent herein the lawful owner of the **disputed land**.

In this appeal, both parties are represented. Mr. Cleophas Manyangu, learned advocate, represents the appellant whereas Mr. Benedict Pius, also learned advocate represents the respondent. With direction of the Court, the appeal

was argued by way of written submissions. I commend both counsel for their very informative submissions.

In support of the second ground, Mr. Manyangu, relying on the provision of section 11 of the **Land Disputes Courts Act, Cap. 261, R.E, 2019, ( "Cap. 216")** faults the **appellate tribunal** in not quashing the judgment and proceedings of the **trial tribunal** for the reason of the tribunal not being properly constituted. He submits that, the names of the members reflected in the judgment do not suggest that the gender requirement was complied with. He therefore urges the Court to allow the appeal and quash the decisions and proceedings of both the tribunals. He has placed reliance on the authorities of this Court in **JOSEPH KITANGO VS. PAULINA NDITI, HC LAND APPEAL NO. 26 OF 2008 (UNREPORTED)** and **MARIAM MADALLI VS. HADIJA KIHEMBA (UNREPORTED- HC LAND DIVISION)**.

In rebuttal, Mr. Pius has urged the Court in the first place not to consider the ground on account that it was not raised in the first appeal. He places reliance on the decision of the Court of Appeal in **MAKORI WASSAGA VS. JOSHUA MWAIKAMBO AND ANOTHER (1987) TLR 88**. In the second place, it is the counsel' submissions that, failure to demonstrate in the proceedings

gender representation is a curable defect in as much as it does not occasion any failure of justice.

I have thoroughly examined the decisions and proceedings of both the tribunals. I have observed that, on 10<sup>th</sup> day of October 2015 when the hearing of the case commenced at the **trial tribunal** as much as in the subsequent trial proceedings, the names of the members who constituted the **trial tribunal** are not been disclosed. It is only in the judgment that the names of the members feature out.

Therefore, this being the Court of record it cannot, in the absence of evidence from the proceedings, ascertain whether the **trial tribunal** on the said dates was duly constituted. It is more so difficult for the Court to imply that the persons whose names appear in the judgment are the ones who presided over the trial. Under section 11 of **Cap. 216**, the ward tribunal is composed of not less than four and not more than eight members. The jurisdiction of the ward tribunal is only available if it is duly constituted. It would follow therefore that, the omission to reflect the names of the persons who constitute the ward tribunal during trial is an error which affect the jurisdiction of the same. It is no doubt an incurable irregularity which vitiates the

judgment and proceedings of the **trial tribunal**. There are numerous precedents in line with this proposition. For instance, in **ANE KISUNGA VS. SAIDI MOHAMED, LAND APPEAL NO. 59 OF 2009 (unreported- HIC-LAND DIVISION)** this Court as per Mziray, J, as he then was, remarking on the effect of section 11 of **Cap 216** had the following to say:

*"My interpretation of the cited law is that; the names and gender of members participating in a case in the Ward Tribunal must be shown in order to ascertain its composition as to whether it is in compliance with the law. Those members who participated during the trial, their names and gender must be recorded on Coram on each day the trial takes place up to the stage of judgment. Failure to follow proper procedure it is difficult to know as in this case, the members who participated to compose the Judgment were the same as those who appeared during trial"*

A similar position was shared by His Lordship Nchimbi, as he then was, in **JOSEPH KITANGO VS PAULINE NDITI (supra)** and Madame Judge Mango in **MARIAM MADALI VS. HADIJA KIHEMBA (supra)**.

Much as I am aware of the position of law in **MAKORI WASSAGA (supra)** that, a ground not raised in the first appeal, cannot be raised in the second appeal, it is my understanding that, the said position constitutes a general rule which admits some exceptions. One of such exceptions, in my humble view, is

where, as in the instant case, the issue involved is jurisdictional. This proposition is founded on various pronouncements of the Court of Appeal.

For instance, in **SOSPETER KAHINDI VS. MBESHI MASHINI, CIVIL APPEAL NO. 56 OF 2017, CAT, MWANZA, UNREPORTED**), the Court of Appeal of Tanzania as per Ndika, J was of the following observations:-

*"At this point we would hasten to acknowledge the principle that the question of jurisdiction of a court of law is so fundamental and that it can be raised at any time including at appellate level. Any trial of a proceeding by a court lacking requisite jurisdiction to seize and try the matter will be adjudged a nullity on appeal or revision. We would also stress that parties cannot confer jurisdiction to a court or tribunal that lacks the jurisdiction.*


The principle was stated in **MANAGING DIRECTOR OF NITA CORPORATION VS. EMANUEL L.T. BISHANGA(2005), TLR, 380**, where it was held that, matters of jurisdiction may be raised at any stage, as they go to the root of justice.

In my opinion therefore, since the proceedings of the **trial tribunal** are silent on the membership composition on various dates of the hearing of the case, it is obvious that the judgment and proceedings under scrutiny are null and void. Therefore, the appellate **tribunal**, I will agree with Mr. Manyangu, was wrong in basing his decision on a nullity decision of the **trial tribunal**.

For those reasons therefore, I will allow the appeal on account of the second ground. The judgments of both the **trial tribunal** and **appellate tribunal** are hereby set aside and the proceedings thereof quashed. The file is hereby remitted to the **trial tribunal** for retrial. For obvious reasons, I will not give order as to costs

It is so ordered.



  
**I. MAIGE**  
**JUDGE**  
**19/02/2020**

Date 19/ 2/2021

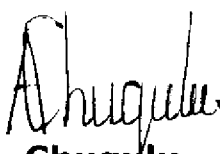
Coram: Hon. a. Chugulu - DR.

Appellant: Mr. Benson Colex Adv. holding brief for C. Manyangu, Adv.

Respondent: Mr. Benson Colex Adv.

RMA: Bukuku

**COURT:** Judgment delivered this 19<sup>th</sup> day of February, 2021 in the chamber Court in the presence of Mr. Benson Colex, learned counsel for respondent. Right of Appeal fully explained.

  
**A. Chugulu,**  
**DR**  
**19/2/2021**